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# Legal Education and Bar Admissions: A History of the Nebraska Experience

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## I. INTRODUCTION

For the last quarter of a century, a Nebraska bar candidate has been eligible to practice in the state if he or she graduated from a three year full-time or a four year part-time law school approved by the Council on Legal Education and Admissions to the Bar of the American Bar Association, attended at least three years of college before law school, and passed a bar examination administered by a supreme court appointed bar commission.<sup>1</sup> If the candidate was a licensed practitioner in another jurisdiction, he or she would be eligible for admission in Nebraska if the other jurisdiction had requirements equal to Nebraska's or if he or she had practiced law for five of the ten years before application.<sup>2</sup> There are now no

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1. Nebraska Supreme Court Journal LLL, at 163-64 (1949); SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AMERICAN BAR ASSOCIATION, REVIEW OF LEGAL EDUCATION, 25-26 (1951).

2. Nebraska Supreme Court Journal LLL, at 163-64 (1949).

other ways of becoming an attorney in Nebraska. In 1854, when President Pierce signed the Kansas-Nebraska Act establishing the Territory of Nebraska, there were no educational requirements for bar admission. This paper will examine the institutional history of these basic educational prerequisites—the law school study requirement, the pre-law school study requirement, and the bar examination requirement.

These basic educational requirements are, and have been, only one aspect of the requirements for bar admission. Now, and in its past, Nebraska has had various requirements relating to age, sex,<sup>3</sup> race,<sup>4</sup> citizenship,<sup>5</sup> residence, loyalty and character. It also has had a variety of mechanisms for ascertaining relevant facts, and for making critical judgments.<sup>6</sup> This is particularly true with issues of loyalty and character. This article will not examine these important areas. There also are, and have been, substantial problems relating to the quality of education. The answers to such questions as what should be learned in a pre-legal study period, or what should be taught in the law schools, or what criteria should the bar commission use in its tests, are not now, and never have been answered with confidence or unanimity. Even simple questions such as how big a law school should be or how many books it should have or how many teachers should be full-time have troubled informed persons. This article will only tangentially address these issues.

The focus of this article will be objective education. It will examine how Nebraska has answered questions similar to these: How many years of pre-legal education should be required of bar applicants? Should legal education be in a law office or in a law school? How many years of legal education should there be? Should there be a bar examination, and how should it be administered?

In exploring the Nebraska history of these questions, several themes will be developed. First, the full-time day school eventually gained a near monopoly on controlling access to the bar. This was done at the expense of law office study and local night school study. Such a result was consistent with national trends, and it was due, in large part, to the lobbying of legal academics and professional organizations.<sup>7</sup> Second, the supreme court eventually

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3. The applicant had to be male. Law of Feb. 13, 1857, ch. V, § 1, [1857-58] Neb. Laws 54.

4. The applicant had to be white. *Id.*

5. The applicant had to be a United States citizen. *Id.*

6. Compare Nebraska Supreme Court Journal BBB, at 317-19 (1936), with Nebraska Supreme Court Journal CCC, at 237 (1937).

7. There is little evidence that, in Nebraska, these changes resulted from

asserted power and control over the issues. This was done at the expense of local district court control and of legislative control and regulation. Third, formal and institutional changes came only periodically. After a wave of change in the rules and the system, a period of relative surface stability would set in. However, beneath the surface, there were constant developments which would require change in the formal arrangements. The establishment of the Territory and the State invited a rush of statutes and rules. The economic, demographic and social problems of the 1890s and the first decade of this century caused another wave of change.<sup>8</sup> The third such period was the Great Depression era. The periods of change are examined in sections II, IV and VI; and the years of developing tensions are studied in sections III and V.

This article has no reforming purpose; it only seeks to inform. Nebraska has had a stable set of rules and a static institutional system for 25 years. Many may believe that the ways of today are either self-evident or immutable. This history should dispel any such beliefs. At the same time, a change in the rules or the institutions is not inevitable. This paper does not predict the future. To avoid any suggestion of a prediction, this paper does not examine developments since 1950, the approximate point at which the rules and system were last stabilized.

## II. 1854-1867. DECENTRALIZED ACCESS AND MINIMUM EDUCATIONAL STANDARDS

In 1854, Nebraska became a territory. In need of an appropriate institutional structure to regulate the education and admission of attorneys, Nebraska groped toward a solution by means of ad hoc court action<sup>9</sup> and three pieces of comprehensive legislation.<sup>10</sup> The resulting arrangement was a product of the territorial political system, the social and demographic facts of the territory and certain national movements and attitudes related to lawyers and education.

The territory was governed by the organic Kansas-Nebraska Act until statehood in 1867.<sup>11</sup> The act was silent on the issue of

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Protestant prejudice against Jewish and Catholic immigrant lawyers. This thesis is ably presented in J. AUERBACH, *UNEQUAL JUSTICE* (1976), with evidence drawn primarily from Eastern, urban areas.

8. See J. OLSON, *HISTORY OF NEBRASKA*, 220-60 (2d ed. 1966).

9. See Jessen, *Historical Address*, 3 NEB. L. BULL. 317, 323 (1925).

10. See Act of Mar. 9, 1855, [1855] Neb. Laws 199; Act of Feb. 13, 1857, ch. V, [1857] Neb. Laws 54; Rev. Stat. of the Territory of Neb., ch. III, §§ 1-3, 9, 11 (1866).

11. Kansas-Nebraska Act, ch. LIX, 10 Stat. 277 (1854). The act vested the executive power in the Governor, the legislative power in the Governor and the legislative assembly, and the judicial power in the territorial supreme court, the district courts, the probate courts, and the justices of the peace.

attorney qualifications. Because Acting Governor Thomas Cuming called a term of the Nebraska Supreme Court before the first legislature met, the court alone admitted attorneys to practice.<sup>12</sup> This occurred in February, 1855, with no discussion of the right of the court to do so.<sup>13</sup> Moreover, it was unclear whether these attorneys were entitled to practice in district courts. Later that year, the rights of the attorneys so admitted were clarified by law. The new law provided that any lawyer admitted to practice before the supreme court also could practice in the lower territorial courts.<sup>14</sup> No formal method was used to test the knowledge of these first applicants, but presumably all were qualified because they were recommended by the territory's attorney general.

Despite the court's action in 1855, contemporary opinion was unclear as to whether courts or legislatures had ultimate authority to regulate the admission of attorneys.<sup>15</sup> It is likely, however, that the Nebraska legislature believed that it had the power. First, this was in accord with popular democratic notions of governmental control. In many states, democratic, Jacksonian legislatures had reasserted their control over bar admissions.<sup>16</sup> Second, although some courts might assert their own common law power in this area, that power most effectively could be supported in a state with some form of constitutional separation of powers clause. All of Nebraska's governmental institutions were legislative, and therefore no one could assert separate and independent constitutional power.<sup>17</sup> Third, the territorial law of 1855 provided that the judges must

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12. Governor's Proclamation of Dec. 20, 1854, [1855] Neb. Laws 51.

13. Justice Ferguson stated: "Gentlemen, we welcome you as officers of the court." Jessen, *supra* note 9, at 324. This indicates that attorneys were admitted only to the supreme court bar. Justice Harden, however, declared: "Gentlemen: We welcome you to the bar of the territory of Nebraska." *Id.* This would indicate that attorneys were admitted to the bars of all the courts.

14. Act of Mar. 9, 1855, § 1, [1855] Neb. Laws 199.

15. A. REED, TRAINING FOR THE PUBLIC PROFESSION OF LAW, 78 (Carnegie Foundation Bull. No. 15, 1921). But see Lee, *The Constitutional Power of the Courts Over Admission to the Bar*, 13 HARV. L. REV. 233 (1899).

16. A. CHROUST, II THE RISE OF THE LEGAL PROFESSION IN AMERICA 224-80 (1965); L. FRIEDMAN, A HISTORY OF AMERICAN LAW 278 (1973).

17. Part of the confusion is reflected in the contemporary case of *Ex Parte Secombe*, 60 U.S. (19 How.) 9 (1857), in which Chief Justice Taney upheld a Minnesota territorial court's power to disbar an attorney. The Court's partial reliance on the territorial legislature's enactment of "general rules upon which the courts of common law have always acted," *id.* at 14, supports a conclusion of legislative primacy. But the Court also stated, "[I]t has been well settled, by the rules and practices of the common law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney . . . ." *Id.* at 13.

determine if the applicants met certain legislatively articulated standards, and if they did, the judges "shall" admit the applicants to practice. The legislature, believing it had such power, left little room for judicial discretion. Moreover, the Territorial Law of 1855 explicitly provided that no court rules "shall" be made "which conflict with any enactment of the legislative assembly."<sup>18</sup> By 1857 the legislature had rewritten the law with a permissive "may" and without the "conflict" language.<sup>19</sup> The 1866 law repeated this latter spirit.<sup>20</sup> Nevertheless, the 1855 law indicated the contemporary idea of the legislature's power, and the 1857 and 1866 laws merely showed how the Nebraska legislature chose to exercise it.

The question of which judicial institution should be granted the power by the legislature to admit attorneys, and how extensive this power should be, was in part answered by the social and demographic features of the territory. Nebraska was a rural, underpopulated and decentralized territory, in which many officers served several functions.<sup>21</sup> For example, the three supreme court justices were also the judges of the three original district courts.<sup>22</sup> Against such a background, it made sense to decentralize the bar admission system. Each geographic locality provided an avenue for admission. At the same time, the dangers that such a system would invite unfair inequalities were minimized, for all the functionaries were to know each other's standards. The 1855 statute provided that each district court could admit attorneys to practice in any court of the territory, including the supreme court.<sup>23</sup> In 1857, the supreme court was given theoretical protection from a potentially standardless bar. Each district court's power was limited to the admittance of attorneys to practice in all other lower courts. The supreme court was given power to control its own bar.<sup>24</sup> As a practical matter, admission of district court attorneys to supreme court practice became a pro forma matter.<sup>25</sup> Thus, by 1857 the institutional pattern for the next 38 years was established. Each district court had the de facto power to admit attorneys to practice in all other Nebraska courts.

Not only was the Nebraska system in accord with its mid-century needs, it also was consistent with one of the three prevalent systems. It was a moderate model—a step more central-

18. Act of Mar. 9, 1855, §§ 1, 3, [1855] Neb. Laws 199.

19. Act of Feb. 13, 1857, ch. V, § 1, [1857] Neb. Laws 54.

20. Rev. Stat. of the Territory of Neb., ch. III, §§ 1-3, 9 (1866).

21. J. OLSON, *supra* note 8, at 78-101.

22. Kansas-Nebraska Act, ch. LIX, § 9, 10 Stat. 280 (1854).

23. Act of Mar. 9, 1855, § 1, [1855] Neb. Laws 199. As noted earlier, this law also provided that attorneys admitted in the supreme court could practice in the lower courts.

24. Act of Feb. 13, 1857, ch. V, § 2, [1857] Neb. Laws 54.

25. A. REED, *supra* note 15, at 68-70.

ized than those jurisdictions which permitted each court to regulate its own bar, and a step less centralized than those few jurisdictions which gave all admitting power to one court.<sup>26</sup> The future development of Nebraska's system would be to the more centralized model as the territory's social and demographic features changed.

From the mid-20th century perspective, the territorial legislature's educational requirements for attorneys seemed minimal. In 1855, the law merely required that the applicant pass a law test before a judge in open court.<sup>27</sup> By 1866, the law provided that each applicant not only had to pass a law test under the direction of the court, but also that each applicant had to have studied for two years in the office of a practicing attorney. An attorney admitted to practice before a court of another jurisdiction was relieved of these requirements.<sup>28</sup> From the contemporary perspective, however, the Nebraska rules were considered demanding.<sup>29</sup>

In the decades before the Civil War, much of the country adopted radical notions of egalitarianism. Frequently termed Jacksonian democracy, its tenets were that each person should have equal access to all positions in society. It resulted in a deprofessionalization of the bar,<sup>30</sup> and in a few jurisdictions, the philosophy was carried to such an extreme that the educational standards were dropped completely.<sup>31</sup> Any formal prerequisite was interpreted as a barrier to access. However, moderate Jacksonian notions were

26. *Id.*

27. Some thought the test too easy. Applicants from other jurisdictions would come to Nebraska, take the exam, and then return home to be attorneys. M.B. Reese wrote:

Among other things enacted by that legislature was a law for the admission of attorneys to practice at the bar of courts. The principle requirement was 21 years of age, satisfactory evidence of a good moral character, and passing an examination, in what is not stated, before a judge. Those essential elements being present, the lawyer was made. The "results" of this legislation was the immediate immigration from adjoining states and territories of those without other preparation than the requisite age and moral character to this territory. They were admitted to the Bar and returned to their homes fully prepared to aid the courts in those states and territories in the administration of justice.

Reese, *The Results of the Pioneer Session from a Legal Point of View*, in PROCEEDINGS AND COLLECTIONS OF THE NEBRASKA STATE HISTORICAL SOCIETY 135, 138-39 (1898).

28. Rev. Stat. of the Territory of Neb., ch. III, § 9 (1866).

29. In 1860, only 9 of 39 jurisdictions required a preparation period. Stevens, *Two Cheers for 1870: The American Law School*, in LAW IN AMERICAN HISTORY 417 (D. Fleming & B. Bailyn eds. 1971).

30. R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 223-49 (1953).

31. L. FRIEDMAN, *supra* note 16, at 277.

not inappropriate for a frontier community like Nebraska. Good men needed freedom to rise, and the fact that there was not a pool of qualified persons with appropriate credentials practically mandated such a philosophy. Nebraska's 1855 rule requiring only a test was typical of other jurisdictions' requirements before the Civil War.

In the post-Civil War period, jurisdictions began to tighten their bar admissions standards. The increased complexity of American life made it essential that its law functionaries be better trained. Moreover, the extremely low requirements of pre-Civil War days had resulted in a loss of professional "esprit." After the war, the lawyers' sense of group identity increased, as did their self-concept, and it seemed natural that some form of pre-admissions training be required. This was an aspect of professionalizing.<sup>32</sup> In 1866, Nebraska was one of the first jurisdictions to require such training—a two year period of study in the office of a practicing attorney. This was typical of developments in other jurisdictions.

By 1867, a system for bar admission had developed. The legislature believed it had the power to regulate the process. It had decreed that each district court judge could admit bar applicants to all other lower courts, and the practice was to admit such district court lawyers to the supreme court on formal motion. Each judge was to supervise a test of the applicant's legal knowledge, and each applicant was to have studied for two years in the office of a practicing attorney. If the applicant had been admitted to practice in another jurisdiction, he was exempted from these requirements.

### III. 1867-1893. DISSATISFACTION WITH DECENTRALIZATION AND WITH LAW OFFICE TRAINING

In 1867, Nebraska was admitted to the union as a state. The next quarter-century was a period of formal surface stability in spite of important social and economic changes in the state.<sup>33</sup> Tensions fermented between this formal, institutional stability and the urbanization and growth of the state and nation, the development of the law school community, and a revitalized professional consciousness. Finally, in 1893, the tensions gave way to change. The Nebraska pattern was similar to that in other states, although the forces developed more slowly in Nebraska than they did in the more urbanized Eastern states.

32. R. POUND, *supra* note 30, at 253-70.

33. There was a minor change in the attorney's oath. Act of Mar. 9, 1871, § 1, [1870-71] Neb. Laws 107.



Each district court continued to test bar applicants. Each time an applicant sought admission, the judge would appoint an ad hoc committee of local lawyers to test him.<sup>34</sup> The judge would almost certainly accept the recommendation of this committee. Despite procedural uniformity, the actual substance of the tests varied considerably. In some cases, wine, cigars and social conversation characterized the test; in other cases, abstruse real property questions were asked; in still other cases, the procedure was seen as an opportunity to make a first business contact with a new member of the local legal fraternity.<sup>35</sup> Perhaps a partial explanation for

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34. In 1870, the judges in 9 jurisdictions used "standing committees" to assist them, while in 29 jurisdictions, judges used ad hoc committees. A. REED, *supra* note 15, at 101. For an example of the practice in Nebraska see the *Wahoo Independent*, Oct. 24, 1878, at 3, col. 4.
35. Throughout the nation, the substance of local testing varied considerably. L. FRIEDMAN, *supra* note 16, at 277; Wilson, *Early Bar Examinations in Nebraska*, YEARBOOK, COLLEGE OF LAW, UNIVERSITY OF NEBRASKA, 1906, 85. For a flavor of the Nebraska experience, some contemporary comments follow:

I do remember his telling me of his examination for admission. The District Judge appointed a committee to examine him, and the committee adjourned to a separate room with my father; a box of cigars and bottle of whiskey was produced, and they had a good social chat. Then the committee reported to the judge that my father was well qualified, and he was sworn in and given his certificate.

Letter from Guy A. Hamilton to Robert G. Simmons, Oct. 21, 1941, on file at Nebraska State Historical Society.

When I was admitted thirty years ago those were the requirements, plus examination by a committee of the local bar. I remember that my own examination was very rigorous. The first question propounded to me was: "Is the rule in Shelley's case in force in Nebraska?" and I answered promptly that it was, and then I said: "Gentlemen, I have answered your inquiry without a doubt, but there are certain implications of that venerable doctrine that I would be glad to see elaborated by the committee"; and then a strange thing happened. A hurried consultation was held and the chairman of the committee said: "Your examination has been so satisfactory that you may now consider the incident closed, and we will hurry away to get refreshments"—which we did.

- 13 NEB. STATE BAR ASS'N PROCEEDINGS 41 (1922)

I remember on the occasion when I was examined three of us appeared, but none of the members of the Committee except the chairman were present. As my recollection now serves me I was asked one question and there was some doubt in the minds of those present as to whether my answer was correct. The chairman evidently concluded that it would be unwise to ask any more specific questions. We spent a good deal of time discussing various problems, legal and otherwise, and at the end of the interview we were informed that it was the opinion of the chairman that we were well qualified to enter the practice. It was about eleven o'clock and after an hour or shortly thereafter I put my associate to bed and then walked about two miles to my place of abode. The chairman

the variations depends on how well the local committee knew the applicant. Frequently, he had studied in the office of a local practicing attorney. Regardless, the system increasingly became characterized by unfairness. A centralized testing institution was seen as an answer.<sup>36</sup>

As Nebraska became more accessible geographically, two problems arose for Nebraskans who wanted high educational admission standards and/or local control of the Nebraska bar. First, the bar reciprocity rules permitted many lawyers admitted elsewhere to practice in Nebraska without any test. This implied no local quality control. Second, the law required that the applicant have studied for two years in the office of a practicing attorney. It did not state if the preceptor had to be a Nebraskan. Proponents of local control and of education on local matters must have insisted that the office be in Nebraska. Observers of the increasingly national character of law business must have argued for law study anywhere. The Nebraska solution would be a compromise.

The Nebraska attorneys of this period were a diverse group. First, although they were better educated than the general public, the educational backgrounds of each lawyer varied enormously.<sup>37</sup> In some cases, the lawyer not only had a college education, but also a formal law education. In other cases, the lawyer was barely literate. Second, the Nebraska lawyers were a transient group. Frequently, they had been admitted to practice in another jurisdiction, and were admitted in Nebraska without examination. Apparently many had headed west to seek their fortunes.<sup>38</sup> Often, those who were admitted to practice and who listed themselves as lawyers practiced little law.<sup>39</sup>

In spite of educational diversity, in the three decades after the Civil War, there was a striking growth in university related law

recommended our admission and on the 26th day of April, 1890 I was admitted to the Bar of the District Court of Douglas County. I have been at it ever since.

Letter from I.J. Dunn to Robert G. Simmons, Apr. 29, 1942, on file at Nebraska State Historical Society.

36. A. REED, *supra* note 15, at 73; see 13 NEB. STATE BAR ASS'N PROCEEDINGS 41 (1922).

37. The author examined the biographies of all persons listed as attorneys in Nebraska City in the Nebraska State Gazeteer and Business Directory for 1879. See R. DALE, OTTO COUNTY PIONEERS, A BIOGRAPHICAL DICTIONARY (1965).

38. D. Morrison, The Lawyer in Wahoo, Nebraska, 1870-1890, Dec. 19, 1973 (unpublished paper in the files of the author).

39. M. Haskell, Wahoo, Nebraska, 1878—A Legal Sketch, Apr. 1, 1976 (unpublished paper in the files of the author).

schools. In 1860 there were only 21 law schools, or seven for 10,000,000 persons. By 1890, there were 61 law schools, or 10 for 10,000,000 persons.<sup>40</sup> The growth of the law school went with the increasing awareness of the need for higher educational admissions standards. Commerce and law were becoming more complicated, and many believed that more formal education was the best means to achieve increasingly necessary lawyer skills. This belief was reinforced by the informality, diversity and inadequacy of the contemporary educational system.

The early history of the University of Nebraska Law College is not atypical of the growth of law schools during this period. In the late 1880s law students studying in various Lincoln offices began to study together in a law office at night. A local lawyer organized the talks.<sup>41</sup> In 1889, William Henry Smith, a seventy year old Philadelphia lawyer, came to Lincoln and further systematized and organized the courses. He invited local attorneys to address the students, and he named his institution the Central Law College.<sup>42</sup> In 1892, at the request of the local bar association, the Central Law College was merged, as a law department, into the University. As an indication of the popularity of formal law education, one reason for the merger was the fear that too many young men were going to school out of state.<sup>43</sup>

The early pattern of law study and pre-admission requirements at the University was also typical of the period. The College of Law was an undergraduate department, and it awarded a degree after two years of formal law study. At this time, very few law schools required anything more.<sup>44</sup> Pre-admission requirements of the college were even more relaxed. Students were to know English, and to possess skills sufficient to pass an examination "in those branches generally taught in the best district schools, or in the graded schools under the high school."<sup>45</sup> In other words, applicants were to have the equivalent of a grade school education. The law school's timid stance is understandable in light of the con-

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40. A. REED, *supra* note 15, at 442.

41. YEARBOOK, COLLEGE OF LAW, UNIVERSITY OF NEBRASKA, 1904, at 26-27.

42. Supposedly, W.H. Smith started the Central Law College partly because he was too old to get his own clients. See Allen, *History of the Organization of the University of Nebraska Law School*, 22 NEB. L. REV. 200 (1943).

43. [1892] THE UNIVERSITY OF NEBRASKA ELEVENTH BIENNIAL REP., BD. OF REGENTS 10.

44. A. REED, *supra* note 15, at 448-49. Even Harvard did not require three years of law school study until 1878, and it did not require applicants to be college graduates until 1909. Stevens, *supra* note 29, at 427-30.

45. University of Nebraska Bulletin, College of Law, 1891-1892, at 7.

temporary ambivalence toward the desirability of formal education and the fact the such education was not a prerequisite to bar admission.

During this period, the law schools' struggle was to establish itself as an alternative form of legal education. First, the law schools sought equivalency. For example, the Nebraska statute, as those in many other states, required a period of study in a lawyer's office. Increasingly, other jurisdictions recognized law school study as an equivalent.<sup>46</sup> The problem was not a major one in Nebraska, because there was no Nebraska law school until the late 1880s.<sup>47</sup> Second, the law schools sought legitimacy. Many schools in other jurisdictions fought for the diploma privilege—the right of graduates of designated law schools to be admitted to practice without taking the examination required of persons who had studied in a law office. In 1870 only nine schools had the privilege; by 1890, 26 schools had secured it.<sup>48</sup> In addition to legitimizing law school education, the privilege served two functions. It was an inducement to have students attend school rather than study with a lawyer, although in most cases the bar exam required of law office students was not a major barrier to bar admission.<sup>49</sup> It also gave law schools a means of competing with each other for law students. In some jurisdictions, like New York, this resulted in unseemly lobbying for the privilege, and then, even more unseemly inter-law school adjustments of admissions and graduation standards to attract students. The result of this display was that in some jurisdictions the diploma privilege was losing favor before the turn of the century.<sup>50</sup>

As the "esprit" of the lawyer class increased during this period, lawyers began to form professional organizations. Not only local ones, as in Nebraska,<sup>51</sup> but national organizations, such as the American Bar Association, were formed. Initially these were selective, social clubs. Their memberships were limited to the most successful and affluent.<sup>52</sup> From the start, these associations were

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46. A. REED, *supra* note 15, at 243-48.

47. When the problem arose, the admitting district courts were likely to consider study in law school as equivalent to study in a law office. *In re Admission to the Bar*, 61 Neb. 58, 84 N.W. 611 (1900), supports this conclusion. Although decided some years later, the case addressed the problem of an attorney's admission with school, rather than office, study, thus hinting that some district courts had permitted the practice.

48. A. REED, *supra* note 15, at 265-66.

49. Stevens, *supra* note 29, at 417.

50. G. MARTIN, *CAUSES AND CONFLICTS* 387 (1970).

51. See J.M. WOOLWORTH, *ADDRESS TO THE NEBRASKA STATE BAR ASSOCIATION* (1877).

52. J. HURST, *THE GROWTH OF AMERICAN LAW*, 286-87 (1950).

interested in legal education and bar admissions. The record of the ABA, as the most articulate national organization, is instructive.

One of the ABA's first committees was the Committee on Legal Education and Bar Admission. This indicates its early concern with the problem. The committee was quickly dominated by law school men,<sup>53</sup> and they consistently pushed for pro-law school positions before the Association, as a whole, was ready to adopt them. While the law school proponents were unified, the general bar membership had conflicting loyalties and concerns. Most of them had not had a law school education. Therefore, the ABA was at most willing to grant equivalent status to formal school education. Although in 1879 the Committee recommended that three years of law school study be required for admission for practice, the Association recommended in 1881 only that law school study be deemed an equivalent of law office study.<sup>54</sup> By 1892 the Association was willing to recommend that both law office and law school study should be two years in length.<sup>55</sup> The ABA's support for at most equivalent treatment is also reflected in the fact that it took a firm stand against the diploma privilege.<sup>56</sup>

The ABA's early actions revealed a pattern that would become common in both national and local bar associations. Law school committees and groups within the law community would promote pro-law school positions. The general membership would delay and impede these positions, eventually adopting them in modified form. But frequently, because of these internal divisions, the law community would be unable to convince the public of its position.

#### IV. 1893-1910. CENTRALIZED ACCESS AND LAW SCHOOL LEGITIMIZATION

From 1893 to 1910, Nebraska's admissions system was changed to respond to the unfairness and inadequacies of the existing

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53. Seavey, *The Association of American Law Schools in Retrospect* . . . 3 J. LEGAL ED. 153, 155 (1950).

54. The ABA resolved:

That the time spent in any chartered and properly conducted law school ought to be counted in any state as equivalent to the same time spent in an attorney's office in such state, in computing the period of study prescribed for applicants for admission to the Bar.

Sullivan, *The Professional Associations and Legal Education*, 4 J. LEGAL ED. 401, 405 (1952).

55. A. HARNO, *LEGAL EDUCATION IN THE UNITED STATES* 76-77 (1953).

56. *Id.*

arrangement. The new consolidated system of 1895 solved some of the prior problems, but it also resulted in the exposure of certain additional problems which the supreme court and the legislature cured in a series of rules and acts from 1902 to 1905. A new institution, the bar commission, with its own interests was created. Law schools continued to grow, and the night school emerged. By 1910, Nebraska had one full-time day school, one combined full-time day and night school and one night school. As might be expected, the law teachers' sense of identity also grew. The teachers lobbied constantly within bar associations and then together with bar associations to (1) legitimize law school education, (2) increase the law school study period and pre-admissions requirements and (3) gain and retain a rough equivalency between law school study and law office study. Their purposes were to improve legal education and to enhance their own reputations. On the whole, they were successful, and by 1910, a bar applicant had to study longer than before and could choose to study in a law school or law office with little time difference.

In 1895, the Nebraska legislature centralized the structure of the admissions process.<sup>57</sup> The unfairness of the decentralized system could not be tolerated as Nebraska was seen as a more unified jurisdiction. The centralization, as part of a national trend,<sup>58</sup> permitted bar admissions to be controlled and limited more easily. The legislature designated the supreme court as the only court with power to admit applicants to the bar of any Nebraska court, and permitted the court to appoint a commission to administer, among other things, the required bar examination. The court quickly appointed a commission<sup>59</sup> and formulated a set of rules for its operation.<sup>60</sup>

This systematic consolidation eventually was successful, but was not fully automatic. In 1900, the bar commission reported to the supreme court "that some of the district courts of the state are claiming and exercising the power to admit attorneys from other states to practice in said district courts."<sup>61</sup> The supreme court responded by clearly stating that all admission power rested with it. "The plain intention of the legislative power, and the necessary effect of the act above referred to, was to vest the power to admit persons to practice as attorneys and counselors of the courts of this

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57. Act of Mar. 30, 1895, ch. 6, [1895] Neb. Laws 72.

58. A. REED, *supra* note 15, at 103.

59. Nebraska Supreme Court Journal H, at 576 (1895).

60. *Id.* at 540-41.

61. [1900] NEB. BAR COMM'N REFS. TO SUP. CT. (entry dated Nov. 21, 1900) (on file with Clerk of Nebraska Supreme Court).

state, solely in the supreme court."<sup>62</sup> Five years later, again after a bar commission complaint, the legislature made it a crime for any unauthorized institution or person, including a district court judge, to admit persons to practice law.<sup>63</sup> Finally, in 1906, the supreme court insisted that a logical entailment of this exclusive power to admit attorneys to practice was the exclusive power to disbar attorneys from practice.<sup>64</sup>

From a mid-twentieth century perspective, the procedures and practices of the early bar commission may seem chaotic. From a contemporary perspective, they were a major step toward uniformity. Although exams could be given orally, they were, from the start, given in writing.<sup>65</sup> Exams were regularly scheduled twice a year, and only infrequently was a special examination given. A rejected applicant could appeal the commission's decision to the supreme court.<sup>66</sup> All were major advances toward systematic uniformity. On the other hand, the bar commissioners could know the bar applicant's identity, presenting the chance of favored treatment. There was no clearly articulated pass-fail line, also inviting possible abuse. However, there were no complaints of bias during this period.

Another function of the bar commission during this period was to highlight problems which had developed under the existing statutory scheme. As has been noted, it first alerted the supreme court to situations in which district courts were admitting persons to practice. In 1899 and 1900 the commission reluctantly interpreted the existing statutory scheme to (1) permit an attorney admitted elsewhere to practice in Nebraska even though he had failed the Nebraska bar exam several times; (2) deny admission of an applicant who had studied in a law school rather than law office; and (3) deny admission to an applicant who had not studied in a Nebraska law office for, apparently, the full two year period.<sup>67</sup> The supreme court agreed with the commission's interpretation.<sup>68</sup> Thus, some of the tensions which had developed since 1866 were exposed. In 1902 and 1903, the court by rule<sup>69</sup> and the legislature

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62. 61 Neb. at 59, 84 N.W. at 612.

63. Act of Mar. 9, 1905, ch. 6, [1905] Neb. Laws 58.

64. *In re Disbarment Proceedings of Newby*, 76 Neb. 482, 107 N.W. 850 (1906).

65. [1896] NEB. BAR COMM'N REFS. TO SUP. CT., *supra* note 61.

66. Nebraska Supreme Court Journal J, at 461 (1896).

67. [1899-1900] NEB. BAR COMM'N REFS. TO SUP. CT., *supra* note 61.

68. 61 Neb. at 60, 84 N.W. at 612.

69. Nebraska Supreme Court Journal P, at 650-52 (1903).

by statute,<sup>70</sup> corrected these deficiencies. Attorneys who had been admitted elsewhere were exempt from examination only if the jurisdiction where they had been admitted had standards, at that time, equal to Nebraska's standards or if the attorneys had practiced five years. Applicants who had studied in a reputable law school were given equal standing with persons who had studied with a lawyer. Applicants who studied in a law office had to do so in Nebraska for at least one year.<sup>71</sup>

While the bar commission was working out the problems inherent in a centralized bar examination system, law school education was becoming increasingly popular throughout the country.<sup>72</sup> Many people were recognizing the need for a more formal introduction to an increasingly complex discipline. The Omaha Law College was formed in 1897<sup>73</sup> and Creighton University added a law department in 1904.<sup>74</sup> Moreover, unique to this period, there was growth in part-time night schools.<sup>75</sup> They developed for two reasons. They served a growing poor, urban and frequently immigrant student body, and in a period in which many students could work in a law office during the day and take formal lessons at night, they were

70. Act of Mar. 11, 1903, ch. 5, [1903] Neb. Laws 54-56.

71. The local/national law problem, see p. 604 *supra*, was thus resolved.

72. The centralized bar exam, administered by the bar commission, became a stable feature, but it always had its critics. The debate was not intense in Nebraska, but at the national level proponents of law school education and the diploma privilege vigorously protested the uselessness of the bar exam. See, e.g., Shaw, Deemer, Shauck & Morris, *Should a Law School Diploma Admit to the Bar?*, 1 AM. LAW SCHOOL REV. 196 (1904). In Nebraska, the full-time schools were only lukewarm to the diploma privilege, and no one argued that to give so much power and control to the bar commission was unwise. In fact, the centralized bar exam, and the concept that law school study is equivalent to law office study, developed together. The lack of antagonism between the Nebraska Bar Commission and Nebraska law schools may in part be explained by the fact that the Bar Commission was, in its early years, staffed with persons sympathetic to formal legal education. For example, in 1896, F. Martin, later dean of Creighton law school, and R. Pound, later dean of the University of Nebraska law college, were bar commissioners. Nebraska Supreme Court Journal J, at 350 (1896).

73. ABA SECTION OF LEG. EDUC. AND ADMISSIONS TO THE BAR, REPORT ON THE UNIVERSITY OF OMAHA LAW SCHOOL (1938) (on file with Clerk of Nebraska Supreme Court) [hereinafter cited as 1938 REPORT ON THE UNIVERSITY OF OMAHA LAW SCHOOL].

74. Frankino & Crisman, *An Historical Look at the Creighton University School of Law*, 9 CREIGHTON L. REV. 228 (1975).

75. A. REED, *supra* note 15, at 443; L. FRIEDMAN, *supra* note 16, at 539.



a reasonably effective means of education.<sup>76</sup> The Omaha Law College was always a night school, even after it merged into the University of Omaha in 1910, and Creighton began to offer a four-year night law program in 1909-10.<sup>77</sup> Both night schools held classes five days a week in the early evenings. The Omaha Law College was staffed with prominent local practitioners who lectured for minimal compensation. This pattern continued throughout this law school's existence.<sup>78</sup> Creighton used both full-time teachers and prominent local practitioners.

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76. J. AUERBACH, *supra* note 7, at 40-102 (1976).

77. In 1909, the Creighton University Bulletin justified the night school:

There is considerable difference of opinion among those in charge of both day and night law schools as to the proper amount of work per week which should be required from the students, but in providing ten hours of instruction per week for its night classes Creighton is keeping pace with the trend of thought among legal educators. . . .

In establishing its night classes Creighton has no desire to cheapen legal education, or provide an easy means of gaining admission to the bar. The step has been taken for the same reasons which have induced other institutions of higher education to provide opportunities of study for those whose circumstances make attendance at day classes impossible. . . .

. . . In every large community there are individuals who are obliged during the day to engage in some lucrative employment and who for financial reasons find it impossible to attend a day school, but are glad of an opportunity at night to study law in an evening law school. Then there are judges and lawyers who find it possible to instruct in night schools, but would find it not practicable to engage in similar work during the day. Some of the Justices of the Supreme Court of the United States have been regular professors in some of the night schools in Washington. And in night schools in New York, Chicago, and in some of the other cities, judges and lawyers of prominence have engaged in the work of instruction.

In so far as the night schools afford an opportunity to persons who have the requisite qualifications, but who for financial reasons cannot attend the day schools, they render a distinct public service. In a country which has a republican form of government and in which the people rule and many aspire to public office and some attain it, it is certainly desirable that citizens should acquire a knowledge of the laws and of how they are administered. Many of the students in the night schools, fully one-third of them it is said, do not expect to make law a profession. They study law for business reasons. That the knowledge of the law which these persons thus acquire is a distinct advantage to them no one will be disposed to question. That there may be a legitimate demand for night schools in the large cities may be taken for granted.

Creighton University Bulletin, College of Law 1909-1910, at 14-15.

78. See 1938 REPORT ON THE UNIVERSITY OF OMAHA LAW SCHOOL, *supra* note 73.

Professional organizations continued to grow, following the ABA pattern of the late 19th century, and the philosophical gap widened between academic lawyers and practicing lawyers.<sup>79</sup> Frequently the academic lawyers lobbied within the law community for more pre-law school study and longer periods of required law school study. After a compromise was reached within the professional community, the academics and the professional organizations sought to influence the public. The law schools' push was for legitimacy and treatment equivalent to law office study. As such, few saw them as seeking primacy, and a resulting exclusivity. This explains, in part, why the professional groups were so successful, why the court and the legislature were so completely in accord, why each adopted its rules and its legislation in tandem, and why few recognized any problem in deciding which institution—the court or the legislature—should set the admissions standard.

The developing structure in the national ABA is again instructive. As has been noted, as early as 1878 there was a Committee on Law Education and Bar Admissions, which came to be dominated by law school men. In 1893 a special Section of Legal Education and Admissions to the Bar was developed to provide academic lawyers with an effective forum.<sup>80</sup> In 1900 the ABA established the American Association of Law Schools.<sup>81</sup> Thus, by 1900, academic lawyers not only had their own forum, but law schools had their own institution. As might be expected, the impetus for increased study began in groups dominated by law school men, such as the Section on Legal Education. In 1897, it recommended that legal education be within the law school, that it be three years in length if full time and that all students have the equivalent of high school educations. The ABA agreed with the pre-legal high school education requirement and the three year law study requirement.<sup>82</sup> However, the ABA did not insist that such study be in law school. Most members of the organization still believed that law school and law office study should be treated equally. Obviously, the law school association, the AALS, took the position that all law education should be in law schools. However, because membership depended on compliance with its rules, in 1900 it only required member schools to offer a two year full-time course, while the ABA was recommending a three year full-time course.<sup>83</sup> However, by

79. Auerbach, *Enmity and Amity, Law Teachers and Practitioners, 1900-1922*, in *LAW IN AMERICAN HISTORY* 551 (D. Fleming & B. Bailyn eds. 1971).

80. Sullivan, *supra* note 54, at 408.

81. Seavey, *supra* note 53, at 157.

82. A. HARNO, *supra* note 55, at 86-87.

83. Seavey, *supra* note 53, at 157-58.

the end of the decade, it required a three year full-time law program, a four year part-time or night law program and an equivalent of a high school education before beginning law study.<sup>84</sup>

Nebraska law schools complied with the ABA and AALS positions. As early as 1897, the University of Nebraska Law College required the equivalent of a high school education,<sup>85</sup> and by the end of the next decade, Creighton<sup>86</sup> and the Omaha Law College<sup>87</sup> had similar requirements. Moreover, by 1905, both full-time day schools, Creighton and the University of Nebraska, required three years of law education.<sup>88</sup> The deans of these two law schools spoke regularly about the importance of these requirements and also of the need for a prerequisite of some college education.<sup>89</sup> However, they also worried that law students might study elsewhere.<sup>90</sup> Therefore, they lobbied for a change in the state rules with respect to admissions.

In 1900, the Nebraska State Bar Association was formed, and like the ABA, one of its principal areas of concern was legal education and bar admissions. The legal education committee<sup>91</sup> was

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84. Stevens, *supra* note 29, at 454-57.

85. University of Nebraska Bulletin, College of Law, 1897-1898.

86. Creighton University Bulletin, College of Law, 1906-1907, at 10.

87. See 1938 REPORT ON THE UNIVERSITY OF OMAHA LAW SCHOOL, *supra* note 73.

88. University of Nebraska Bulletin, College of Law, 1904-1905; Creighton University Bulletin, College of Law, 1904-1905.

89. There is a general feeling among those engaged immediately in legal education that the requirement of a high school education as a minimum for entrance is still too low. It is probable that the association of American Law Schools will insist eventually upon at least two years of college training as an entrance-requirement. In my opinion, we should not hesitate to keep abreast of the requirements of that association as they may be advanced from time to time. I do not favor waiting for the statutory requirements for admission to the bar to be first raised correspondingly. The universities have the right and the duty of insisting upon the value of their law degree. What shall be required for a degree is an academic question. If the requirement for entrance to the schools is placed where it should be on academic grounds, the statutory requirements for the admission to the bar must ultimately follow. For the state can not afford to have its lawyers ill-trained. The injurious consequences of entrusting the administration of justice to mere rule-of-thumb practitioners are already becoming manifest.

[1907] THE UNIVERSITY OF NEBRASKA EIGHTEENTH BIENNIAL REP., BD. OF REGENTS 68. See also Martin, *Training of a Lawyer*, CREIGHTON CHRONICLE, Oct. 15, 1909, at 12.

90. [1905] THE UNIVERSITY OF NEBRASKA SEVENTEENTH BIENNIAL REP., BD. OF REGENTS 41.

91. 1 NEB. STATE BAR ASS'N PROCEEDINGS 30 (1900).

formed quickly and came to be dominated by academic lawyers who began to lobby for their position.<sup>92</sup> They advocated that law study be three years in length and pre-law education be the equivalent to high school education. It was believed that without such a change of rules, many students would study for considerably shorter periods of time in law offices.<sup>93</sup> Within the Association as a whole, there was little resistance to this position. However, because a few worried that a complete high school education was unavailable to all young men in the state, the Association asked for a pre-legal education equivalent to only three years of high school.<sup>94</sup>

In 1902 and 1903, the supreme court and the legislature, acting in tandem, adopted a series of rules<sup>95</sup> and passed a comprehensive act<sup>96</sup> responding to the academic and professional lobby. A bar

92. The Committee on Legal Education was consistently dominated by law school men. In its early years, the law deans of both Creighton and the University of Nebraska served on it.

93. Our State University is now proposing to so combine the courses of university training as to permit the academic student to give the greater portion of his last year's work to the study of the law, and, while receiving his degree of bachelor of arts only, he will be entitled to a year's credit in the law course, which, when extended to three years, will leave but two years' work to be done. This, however, can not be accomplished until, by an act of the legislature, the time for office reading (as a necessary prerequisite to examination) shall be made the same. If a person is permitted to apply for examination and be admitted to the bar after studying law in the office of a practicing attorney for two years, it will remain impossible for the law school course to be extended to three, as this would be offering a premium for office-trained lawyers in preference to law school graduates.

Your committee is persuaded that there is no comparison between legitimate law school training and office study. In the former a methodical course of study is adopted and the foundation for future investigation is laid. To this is added the continuous, persistent study which is necessary to enable one to accomplish the work assigned. Then again the class quiz and discussion of topics studied must always be beneficial. Erroneous ideas will, inevitably, be formed. These are corrected before the lasting impression upon the mind is made by them—one of the best opportunities for this being the class quiz.

In the latter (office study) these opportunities are not had, and the erroneous impressions become fixed. The office study always becomes something of a drag, and much time is lost in attending to matters outside the lines of study and which are an inevitable detriment. Close application becomes tiresome, and much of what otherwise would be a pleasure and an efficient aid in study becomes a burden and a detriment.

1 NEB. STATE BAR ASS'N PROCEEDINGS 48 (1900).

94. 2 NEB. STATE BAR ASS'N PROCEEDINGS 7 (1903).

95. See Nebraska Supreme Court Journal P, at 650 (1902).

96. Act of Mar. 11, 1903, ch. 5, [1903] Neb. Laws 54-56.

applicant had to have three years of law study before taking the bar examination. He could study in the office of a practicing attorney<sup>97</sup> or in a reputable law school, which the court defined as one with a three year course, ten hours a week, thirty-four weeks a year. This could easily include both full-time and part-time schools. Prior to law study, the applicant had to have had the equivalent of three years of high school education. Law school people had wanted to increase the period of pre-legal education and legal education and to assure a rough equivalency in time between the law school course of study and the law office course of study. By 1905, they had virtually attained their objective.

Finally, one anomaly of the period must be examined. In 1893, University of Nebraska graduates were granted the diploma privilege<sup>98</sup> and in 1907 the legislature<sup>99</sup> and the court<sup>100</sup> extended it to Creighton. The ABA<sup>101</sup> and the Nebraska State Bar Association<sup>102</sup> were opposed to the privilege because they endorsed the efficacy of a centralized bar examination and because they still believed in an equivalency between law office and law school study. Therefore, the diploma privilege must be interpreted as the result of a weak law school lobby for special, favored treatment. First, and most obviously, it gave the law student an advantage over law office students. Second, it gave an advantage to a special class of law schools. The privilege was granted to the University of Nebraska and other equivalent schools which were members of the AALS. Graduates of other merely reputable schools still had to take the bar examination. The advantage was more theoretical than actual, for the bar exam was not a major obstacle to admission to practice. This may explain many academics' luke-warm attitude to the privilege.<sup>103</sup>

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97. One year of the law office study had to be in Nebraska.

98. Act of Mar. 30, 1893, ch. 1, [1893] Neb. Laws 63.

99. Act of Apr. 8, 1907, ch. 2, [1907] Neb. Laws 50. The statute granted the diploma privilege to regular graduates

of the college of law of the University of Nebraska or of such other College of Law of this state having entrance requirements and a course of study equal to and equivalent to those of the law school of the University of Nebraska, as the Supreme Court shall, upon application and showing, designate as a college of law whose graduates shall be entitled to admission without examination; Provided that such other college of law shall be a member of the Association of American Law Schools.

*Id.* at 51.

100. THE CREIGHTON BRIEF, 1909, at 9.

101. Stevens, *supra* note 29, at 453-58.

102. 3 NEB. STATE BAR ASS'N PROCEEDINGS 34 (1906).

103. When the Nebraska State Bar Association voted against the diploma privilege, the dean of the University of Nebraska Law College was

By 1910, the legislature had granted the supreme court exclusive power to admit attorneys, and a bar commission administered a required test. During this period, the court and legislature acted in tandem and without conflict. All applicants for the bar examination had to have a three year high school equivalent education and a three year law study period, either in a law office or a reputable law school. Both day and night law school programs were reputable if they operated for a minimum period each week for three academic years. There were two exceptions to the examination requirement. First, an attorney could be admitted to practice in Nebraska if he were admitted in a jurisdiction with the same standards as Nebraska or if he had practiced law for five of the past ten years. Second, a graduate of the University of Nebraska or Creighton could be admitted without examination. As AALS schools, they not only required three years of law study, but four years of pre-law high school study as well.

#### V. 1910-1933. DISSATISFACTION WITH LEGISLATIVE STANDARDS; THE LAW SCHOOLS SEEK PRIMACY

From 1910 to 1933 neither the legislature nor the supreme court changed the system in any significant way. The bar commission administered the examination, and although its actions became more formalized than in its past, the exam did not become a true barrier to bar admission. However, there was subsurface change during this period. First, legal educators, both locally and nationally, continued to increase the educational standards and to push, primarily within the law community, for the primacy of law school education and for a longer period of pre-legal education. Many within the law profession interpreted this as a drive toward exclusivity, rather than mere equivalency, and many judges and lawyers rushed to the defense of alternative study routes. This was consonant with similar activity at the national level. Second, the rivalry between different educational institutions was exacerbated. In Nebraska, the bar debates focused on the school/law office study issue, while the national ABA concentrated on the day school/night school issue. This is explained by the rural nature of the state and by the fact that law office study was primarily a rural enterprise. Nevertheless, the three state law schools did break into two competing camps—the University of Nebraska and Creighton representing the elite, and the University of Omaha representing the non-elite, law schools. Third, it was becoming increasingly apparent that formal law education was useful for a lawyer. The number of students who chose law office study declined, while

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also Chairman of the Committee on Legal Education. See 3 NEB. STATE BAR ASS'N PROCEEDINGS 34 (1906). This explains why the lobbying effort has been characterized as weak.

attendance at the University of Nebraska and Creighton rose. At the same time, however, an increasingly larger percentage of beginning law students were attending night law school. Fourth, most of the educators and, when convinced, lawyers, tried to change the system through the legislature. This democratic institution, responsive to the needs of the populist public, and perhaps perceiving that the line between equivalency and primacy was being crossed, continually rebuked their efforts.

There were no major changes in the formal rules of the system. The court tinkered with the rules for retaking the examination.<sup>104</sup> The legislature added one small class of persons, court clerks, to the groups—graduates of reputable law schools and students in law offices—who were eligible to take the bar exam.<sup>105</sup> This may have indicated a legislative willingness to keep the bar open to persons without formal law education, but probably was a gesture to favor a special group of potential applicants.

The bar commission continued to administer the exam. It was given twice a year, although on occasion special examinations still were given. The exam apparently tested vocabulary and memory.<sup>106</sup> The papers were read quickly, often being graded on the same day as they were taken. In marginal cases, the commissioners would interview and quiz the applicant personally. Because the pass rate on the bar examination was high it was not an effective barrier to bar admission.<sup>107</sup> Although the commission never adopted a set of rules, its actions became increasingly more formal.<sup>108</sup> By the mid-1920s, the commissioners began to require applicants to put numbers, rather than names, on their papers to assure anonymity, and they established minimum test scores.<sup>109</sup>

As the bar commission solidified its position, the educators in the full-time law schools began to push for primacy. Almost before

104. See, e.g., Nebraska Supreme Court Journal NN, at 637-38 (1925).

105. Act of Apr. 24, 1917, ch. 4, [1917] Neb. Laws 57.

106. A typical contracts exam asked: (1) Define a contract. (2) Give the essentials of a valid contract. (3) What is essential before an offer can result in a contract? (4) When can an offer be withdrawn? (5) Name the different kinds of contracts. [1920] NEB. BAR COMM'N REPS. TO SUP. CT., *supra* note 61.

107. See [1893-1910] NEB. BAR COMM'N REPS. TO SUP. CT., *supra* note 61. Frequently, these Reports indicate only those who passed, without listing those who failed. For the years that both are listed, however, approximately 85-95% passed.

108. But rules of procedure were not always strictly followed. For example, early in this period, the commissioners frequently ignored the rule against administering the exam to an applicant who had not reached the minimum required age. See [1910, 1913] NEB. BAR COMM'N REPS. TO SUP. CT., *supra* note 61.

109. [1923] NEB. BAR COMM'N REPS. TO SUP. CT., *supra* note 61.

the ink was dry on the three year high school education rule for all forms of legal study, these elite educators began to push for more.<sup>110</sup> Not only did they want to raise the pre-legal study requirements for their own schools, but, in order to avoid competition, they wanted them increased for all forms of legal education. They believed it was necessary for a proper education, and, of course, they must have believed that more stringent entrance requirements could only enhance their own reputations. As early as 1907, Dean Pound was suggesting two years of college as a pre-admission requirement,<sup>111</sup> and Dean Seavy suggested, in one formal speech, that a full college degree would be useful.<sup>112</sup>

As before, the educators, through the Legal Education Committee of the Nebraska Bar Association, tried to convince the organized profession that an increased entrance requirement for law study was desirable. Their demands increased. High school equivalency and a three year program of law study were recommended first.<sup>113</sup> By the late 1920's, two years of college and either a three year program in a full-time day school or a four year program in a law office or an approved night school were sought.<sup>114</sup> It was obviously during this period that the demand shifted from equivalency to law school primacy.

The arguments in favor of the changes were familiar. The legal demands of 20th century America required educated lawyers, and education required formal schooling. Implicit in this argument was the premise that law educators would be in charge of this institution, and thus, their importance and reputation would be enhanced if all would recognize the significance of their job. Less affirmatively, the educators argued that since the law schools were requiring higher standards, if other bar applicants were not compelled to study for at least the same amount of time, the law schools would be competitively disadvantaged.<sup>115</sup> Even more invidiously, if the requirements for bar admission were raised, some persons would not be able to meet them. They would thus be excluded from the profession. Arguments in other jurisdictions suggest that the requirements were to be raised because the disadvantaged classes were of recent foreign background.<sup>116</sup> There was not much of

110. In fact, as early as 1905, they convinced the Nebraska State Bar Association to lobby for a full high-school prerequisite. 2 NEB. STATE BAR ASS'N PROCEEDINGS 27 (1905).

111. See note 89 *supra*.

112. Address by Dean Seavey, Nebraska State Bar Association, Dec. 28, 1920, in NEB. STATE BAR ASS'N PROCEEDINGS 58, 62 (1920).

113. 10 NEB. STATE BAR ASS'N PROCEEDINGS 67-73 (1919).

114. 20 NEB. STATE BAR ASS'N PROCEEDINGS 17-18 (1929).

115. 8 NEB. STATE BAR ASS'N PROCEEDINGS 55-61 (1915).

116. J. AUERBACH, *supra* note 7, at 40-102.



this rhetoric in Nebraska, although on occasion one did find a complaint about an attorney's poor command of English.<sup>117</sup>

During this period, there was strong resistance to the educators' position within the Nebraska Bar Association. Many of the delegates sensed the law schools' demand for primacy and exclusivity. This opposition was not always successful in defeating various committee recommendations, but it was always articulate enough to demonstrate that the bar was divided on the issue. Thus, even when the organized bar spoke in favor of increased pre-law study requirements and a longer law office study period, it presented a divided front. In part, this accounts for the bar's failure to convince the legislature.

At acrimonious bar association debates, protectors of the status quo defended the three year high school pre-legal study rule and the law office study method of legal training. They made practical arguments that high schools were unavailable to all Nebraskans,<sup>118</sup> and that poor persons could not afford the expensive formal education.<sup>119</sup> They made theoretical arguments, that true learning was

117. In 1916, the Committee on Legal Education, in arguing for a higher educational standard, said:

The undersigned members of your committee cannot subscribe to such a doctrine. A world in which compulsory acquirement of elementary education in the mother tongue, and free public secondary education, in mathematics, languages and science has become almost universal, will not allow the legal profession in the least illiterate of the states to turn its back on all requirements of preliminary general education and yet maintain its claim to be a liberal and learned profession. It should be observed, also, that a too low requirement is probably worse than none at all. It carries a distinct suggestion that anything higher is undesirable. It is a distinct discouragement to the student's looking for anything more.

9 NEB. STATE BAR ASS'N PROCEEDINGS 84 (1916). But this complaint was voiced so rarely that it probably indicates no more than concern over poorly qualified applicants.

118. To this argument, the Committee on Legal Education responded:

There is not a county in the state now, with the possible exception of five in the west end, in which a four year high school course is not obtainable, and their immediate neighbors offer it out there. Four year high schools are more plentiful today than three year ones were in 1903 when the present requirement was inserted. It is not suggested that it ought to be required of all present law students, or of the practicing members of this association, but of those in the future aspiring to become students of the law.

9 NEB. STATE BAR ASS'N PROCEEDINGS 85 (1916).

119. To the argument that the poor could not afford law school, one member replied:

It seems very significant that the younger members of the bar association have shown by their vote, that they are in favor of the law school requirement. One of the best reasons

attained in a law office, and that the real key to lawyering was character<sup>120</sup> which could not be learned in school. They also

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for this is because most of them are familiar with the present conditions in our first-class universities. They know that the poor men who have to work their way through college, are very often leaders there. At my alma mater, the Michigan University, the poor boy is given a chance to earn his way through, by doing odd jobs and chores for the town's people, which are available in most college towns. There are also scholarships to assist the poor young men who merit them. If admission to the bar is worth anything, it is worth working for. Therefore, if the door is not closed to the poor young man, and he is given ample opportunity to work his way through our best schools, there can be no reason why the law school should not be required.

9 NEB. STATE BAR ASS'N PROCEEDINGS 94 (1916) (remarks of Mr. Rosewater).

120. It is not the form of the diploma, it is not the kind of a school that gives you a brand of graduation. The trouble is in the head. I do not care where the man learns, if he knows. He may do it by hard work during the day with his muscle, and studying nights by the candle. The object is, has he the education, has he the moral standing, is he fitted for the place? If he has who is to say nay to him? Some boys cannot go through a high school and go through the formulas. They cannot afford it; but they have the brains and the determination to learn, and they do learn. And some of the best lawyers in all this country are men who never had the advantages of these schools—if they are an advantage, as many of them are placed in these schools and forced to go through rather than from choice. And the boy who has the determination and the brains, and devotes himself during the nights and Sundays and leisure hours to the study of law or any other science, and thereby becomes efficient, who dares to say that he should not be a member of our bar? No one has a right to say it. The object is the qualification, not the manner of the qualification, or how they arrive at it. Has he got it? If he has it is his, and it is valuable to him.

My notion is that we will make a great mistake if we try to lift up the bar in this manner. You are pulling it down rather than lifting it up. How many educated fools have we got in the country? The fact that a man can scramble along and pass in his studies and get pretty fair marks, does not make him a man, does not fit him to be a lawyer at the bar. Go back to the fundamental principle. Who is fitted to be a lawyer? It is the man who has the educated mind, the man who has the knowledge that you want. Does the school do it? If so, well enough. If it is acquired outside of the school, equally so. In either case he is fitted for this position. I will tell you where you had better go for your remedy. Go to your courts and to your examining committee. We never had a committee in this state, that if a man was qualified and had a proper moral standing would not pass him regardless of whether he ever saw a college. The seeing of college walls, and the formal passing through does not make men. It is constant work that brings results.

I do not criticise the law professors, but I want to say to you, if your law professors are what they are assumed to be many times, millionaires would be coming to the bar. It is

made *ad hominem* arguments, hinting that the law schools and professors were inadequate, that the debate was an attempt to enhance the law educators' prestige, that the quality-control argument was simply an excuse to rid the bar of certain classes of persons<sup>121</sup> and that the emphasis on formal education was an economic effort to restrict the lawyer supply.<sup>122</sup>

The Nebraska debate was essentially duplicated at the national level. However, the national debate focused more on the rivalry between various types of law schools rather than on the differences between school and law office study. In part, this was because law office study was an increasingly rural enterprise, and the marginal law school more of an urban endeavor. National organizations

not our best lawyers that go to the colleges to teach law. They do not command salaries sufficient to pick out men that I could select in this room to go into the college and teach. They cannot afford it. They are too good lawyers to give their time to that. I want to say to you that it is not the professor that simply passed through some college or somewhere—just how I do not know—that sits down to teach you the law. We can get that out of our text books. How valuable are the text books to us? How many of us carry a text book under our arm when we go to court? And nearly all of them, with some exceptions are written by professors.

13 NEB. STATE BAR ASS'N PROCEEDINGS 43-44 (1922) (remarks of Judge Baker).

121. Too many men think today they must have a certain amount of education. It is in the school of experience that you get the best education. Many a young man has not the chance to go to these schools, nor has he the time. Under this plan you must start in with four years of high school work and then you must attend a university for one year and three years in an accredited law school, and then you are just starting out to practice; and those of you who are young men, like myself, know that it takes some years to make good in the practice. You will be a man almost gray headed before you are able to earn a living for yourself and establish a home and family. I am not in harmony with this recommendation, as its tendency is to make an aristocratic body of the legal profession. If the applicant pass the examination and he knows the law, that is all we should require.

9 NEB. STATE BAR ASS'N PROCEEDINGS 93 (1916) (remarks of Mr. Rine).

122. I am not surprised that there are some here that want to raise the requirements. It has been suggested that we are as low in our standards as the hod carriers and the brick layers. What this resolution is seeking to do is the same thing as these same labor unions, which you referred to as the hod carriers and brick layers have been doing. That is, you want to limit the number of men who can come into the profession. It has been said the young men are for the substitute. It may be possible that the strenuous strife to get business has induced the young men to take this position, so that there may be less lawyers at the bar to practice. I heard it here yesterday that they were advocating this thing because they said there were too many lawyers.

9 NEB. STATE BAR ASS'N PROCEEDINGS 92 (1916) (remarks of Mr. Rine).

focused on the urban situation. The ABA was a more heterogeneous group than it had been at the turn of the century, but still it was dominated by a social elite.<sup>123</sup> In the early 1920s it was grappling with the problems of pre-legal education, legal education and bar admission.<sup>124</sup> Although it was unclear what the ultimate ABA position would be, the Section on Legal Education had endorsed a three year law school education and two college years of pre-legal education as prerequisites for admission to the bar.<sup>125</sup> As an indication of its mixed practitioner membership, however, it did permit part-time, night school study in four-year institutions. The AALS had become more self-consciously an organization of law educators, and increasingly dominated by elite full-time law schools. As early as 1919, the Association had raised its membership requirements effectively to exclude many part-time and night law schools.<sup>126</sup>

In 1921, Alfred Reed published his first report, *Training for the Public Profession of the Law*.<sup>127</sup> In short, it recognized the stratified social character of the bar, and called for a differentiated system of legal education with one set of schools for those who would do one class of work, and another set for those lawyers who would do more difficult things. The report was anathema to many members of the ABA, for, among other things, it legitimized the "low-class" ethnic lawyer.<sup>128</sup> They responded with a report which advocated a more homogeneous system which would exclude the lower class lawyer.<sup>129</sup> The Section on Legal Education's Committee on Legal Education, chaired by Elihu Root, published this Root Report, and shepherded its recommendations through the ABA. The result was a proposal in favor of (1) law school education of three years if full-time or four years if part-time or night, (2) pre-legal college work of two years and (3) an established list of schools in compliance with ABA rules. The ABA again reiterated its stand against the diploma privilege.<sup>130</sup>

Over the next five years, in part as an effort to gain practitioner support for its cause, the AALS adopted the ABA compromise

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123. J. AUERBACH, *supra* note 7, at 102-57.

124. A. HARNO, *supra* note 55, at 102-08.

125. *Id.* at 104-06.

126. Stevens, *supra* note 29, at 453-64; Seavey, *supra* note 53, at 161.

127. Reed, on behalf of the Carnegie Foundation, had been working on this report for several years. The leaders of the ABA had suggested that he do it, apparently hoping that he would reach conclusions similar to the Flexner Report, which legitimated the demise of low-class medical schools. J. AUERBACH, *supra* note 7, at 109-10.

128. *Id.* at 110-12.

129. Seavey, *supra* note 53, at 162-63.

130. A. HARNO, *supra* note 55, at 105.

towards night school law education,<sup>131</sup> and it relaxed its position on part-time schools; it established its membership requirements to include such schools which permitted the admission of students with only two years of pre-legal college work.<sup>132</sup> Thus by 1926, the ABA and the AALS rules were similar. In 1928, Reed published his second report, again criticizing the myth of homogeneity and decrying the rapidity with which the ABA and AALS rules had become similar.<sup>133</sup> He noted that law schools were being pushed into a single mold. However, after an acrimonious debate in Memphis in 1929, the ABA again endorsed its 1921 position.<sup>134</sup>

In both the national debate and the Nebraska debate, the full-time law educators called for law schools as the only legitimate form of law education. In rural Nebraska, the most vociferous opponents to this position were law office study defenders. In more urban environments, the opposition came from part-time and night school proponents. At the state level, the organized bar could recommend only that the legislature change the law. The ABA and the AALS could not only recommend changes, but could set educational prerequisites for either listing or membership. During this period, no professional groups succeeded completely in convincing the general public or the legislatures of their positions.<sup>135</sup>

Even though there was little debate within the Nebraska Bar Association over the day/night school issue, and the organized bar's position on the school/law office study issue and on pre-legal education had minimal impact on the state legislature, the patterns of legal education were changing. First, the local law schools divided into two camps. Creighton had operated a four-year night school division since the 1909-10 academic year. Its graduates were given a diploma, and they did not have to take the bar exam to be

131. ABA and AALS leaders led a concerted campaign to encourage the adoption of the "Root" rules. In 1922, a Special Conference of Bar Association Delegates substantially endorsed the ABA's positions. *Id.* at 108-12.

132. Seavey, *supra* note 53, at 162-63.

133. A. REED, PRESENT-DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA (Carnegie Foundation Bull. No. 21, 1928).

134. Reed, however, still expressed hope that the forces for differentiation would prevail: "The Section's reaffirmation of its position denotes perhaps firm dealing with an insurrectionary movement, within the organization, rather than a fixed determination to close its mind." CARNEGIE FOUNDATION, ANNUAL REVIEW OF LEGAL EDUCATION 1 (1929). (1929).

135. In 1927, only 50% of the existing law schools met ABA requirements, and only 33% of the students went to AALS schools. Moreover, 32 jurisdictions required no formal pre-law study, 11 required only high school, and only 6 required two years of college. Stevens, *supra* note 29, at 496.

admitted to practice.<sup>136</sup> In 1918, apparently due to pressure from the AALS, it stopped awarding the night school degree.<sup>137</sup> In 1923, it terminated the program.<sup>138</sup> Thus, by 1925, there were two full-time day schools in the state which were both AALS members and on the ABA list of approved schools. There was one unaccredited and unlisted night school at the University of Omaha. Its graduates were eligible to take the Nebraska bar exam. Second, in spite of the educators' failure to get a change in the law, they did change their own admission requirements. In good part due to the national trend, but also due to local initiative, the University of Nebraska raised its pre-legal requirements to one year of college in 1911,<sup>139</sup> and to two years in 1922.<sup>140</sup> Creighton increased its requirements to one year of college in 1917<sup>141</sup> and to two years in 1922.<sup>142</sup> This increase occurred while a law office student, who would be eligible for the exam, could begin his three years of law study after only three years of high school work.

In spite of some evidence in the early years of the period that some students chose the shorter and easier law office study,<sup>143</sup> over the entire period, the day law schools lost little competitively to law office study. Although the bar examination was never a real obstacle to bar admission during this period, only about 25 per cent of law office students took the exam.<sup>144</sup> The attrition rate was high. Moreover, throughout the period, two-thirds of the law office students studied outside the Omaha-Lincoln area.<sup>145</sup> It was thus a rural enterprise, and many who chose law office study did not view urban schools as viable alternatives. As life became more urbanized, formal schooling became an alternative. An inherent result was the percentage of students studying in law offices declined precipitously.<sup>146</sup>

136. *But see* Frankino & Crisman, *supra* note 74, at 230.

137. Letter from Louis J. TePoel to the Carnegie Foundation, Sept. 21, 1920, on file in Creighton University Archives.

138. Creighton University Bulletin, College of Law, 1923-1924.

139. University of Nebraska Bulletin, College of Law, 1911-1912.

140. University of Nebraska Bulletin, College of Law, 1922-1923.

141. University of Creighton Bulletin, College of Law, 1917-1918. From 1911 to 1917, Creighton's entrance requirements were lower than the University of Nebraska's. Thus, though no one raised the issue, it was at least arguable that Creighton's graduates did not qualify for the diploma privilege.

142. University of Creighton Bulletin, College of Law, 1922-1923.

143. 8 NEB. STATE BAR ASS'N PROCEEDINGS 54 (1915).

144. II NEB. LAW STUDENT REGISTER (1913-1951) (on file with Clerk of Nebraska Supreme Court). These figures were compiled by counting those students who had registered and those indicated as having been admitted to practice.

145. *See id.*

146. Students registered in the 1925-30 periods were only 55% of those registered in the 1915-20 period. *See id.*

As the requirements of competing educational institutions changed, so did enrollment patterns. First, day law school enrollment continued to increase until the early 1920s, and then began to decline. The joint enrollment of Creighton and the University of Nebraska law schools was 280 in 1910, 404 in 1920 and 315 in 1926.<sup>147</sup> Second, the enrollment at the University of Omaha showed a steady increase from 90 in 1920 to 137 in 1926.<sup>148</sup> In other words, 18 per cent of the 1920 Nebraska law school students went to the night school. By 1926, its share increased to 30 per cent. In part, this shift in enrollment pattern was attributable to the more stringent pre-legal study requirements of the day law schools. This general pattern was not unique to Nebraska. Throughout this period, larger numbers of schools conformed to ABA and AALS standards, while at the same time more students went to non-member and non-listed schools.<sup>149</sup>

Throughout this period, the focus of the Nebraska Bar Association was on legislation. However, as with the ABA and the AALS, professional lobbying efforts proved generally ineffective with the legislature. It was not ready to grant primacy to formal, elite legal education, especially since the bar itself was divided on the important issues. Nevertheless, it is useful to examine the Bar Association's proposed bill, for it illustrates the issues at the end of this period.<sup>150</sup> Designed to promote the full-time day school, it

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147. See A. REED, *supra* note 133, at 466-67.

148. *Id.*

149. See note 135 *supra*.

150. Be it Enacted by the People of the State of Nebraska:  
 Section 1. Amendment—That Section 261, Compiled Statutes of Nebraska for 1922, be amended to read as follows:  
 Section 261. Attorney at Law—examination—qualifications. The supreme court shall fix times when examination shall take place, which may be either in term or vacation, and shall prescribe and publish rules to govern such examinations and may appoint a commission composed of not less than three persons learned in the law to assist in or conduct any such examination, or examinations. No person shall be admitted to the bar of this state unless such person has met the following requirements:  
 (a) General Requirements: Such person must be twenty-one years of age, of good moral character, a citizen of the United States, and a resident of Nebraska.  
 (b) Education Preliminary to Law Study: Such person prior to beginning the study of law must have had two years of college education such that he would be eligible to admission to the junior class of the college of Arts and Sciences of the University of Nebraska.  
 (c) Legal Education: Such person must have either  
 (1) graduated from a law school which is a member of the Association of American Law Schools, or  
 (2) graduated from a day law school, approved by the

recommended no change in the examination procedure. The bar commission was to administer the exam and graduates of the University of Nebraska and, by court order, Creighton were exempted from it. It is unclear why this diploma privilege was recommended. Neither law school cared much about it, and it must have been an obnoxious assertion of law school primacy. The night school graduate could take the bar examination, if he had studied law for four years and had two years of pre-legal college education. The law office student also could take the bar exam, if he had studied law for four years and had two years of pre-legal college education. He also would be subject to annual examination.

#### VI. 1933-1941. THE JUDICIARY SECURES CONTROL; THE FULL-TIME LAW SCHOOLS GAIN PRIMACY

From 1933 to 1941, there were important changes in the practices of existing institutions, in the formal rules with respect to bar admissions and in the locus of power among competing institutions.

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Supreme Court of Nebraska, requiring completion of a three years' course for graduation, or from a night law school, approved by the Supreme Court of Nebraska, requiring completion of a four years' course for graduation, or

- (3) pursued a course of legal study, wholly in a law office in this state for a period of four years or pursued a four years' course of study, partly in a law school approved by the Supreme Court and partly in a law office in this state.
- (d) Examination: Such person must satisfactorily pass an examination upon the principles of common law, equity, criminal law, constitutional law, and the constitution, statutes and practices of this state.

Graduates of the College of Law of the University of Nebraska or of any other college of law in this state, which is a member of the Association of American Law Schools and has entrance requirements equal to those of the College of Law of the University of Nebraska shall be admitted to the bar without examination. All other candidates for admission must meet all the above requirements.

Candidates for admission to the bar, in order to count time in office study towards meeting the requirement as to legal education, must register, pursue a prescribed course of study, and satisfactorily pass annual examinations, all under the direction and control of the commission named therein.

Provided, However, that all persons who at the time of the going into effect of this act are duly registered as students in a law office in this state, or are regularly enrolled as students in a law college in this state, shall be admitted to the bar on satisfying the requirements that were in effect on the date of such registration or enrollment, except that students in law office shall be subject to annual examinations by the commission, named therein, on subjects prescribed by it.



The academic lawyer lobby gained significant victories. In Nebraska, two factors principally account for this.<sup>151</sup> First, the economic depression caused the lawyers in the state to think in terms of limiting the supply of lawyers. Thus, the opposition to higher exclusionary rules was muted, and the professional organizations began to speak in favor of more stringent admission rules with unity. Second, the lawyers began to direct their appeal to a more sympathetic institution composed of law community men—the supreme court. The bar commission responded first to the new tone. The supreme court then moved against law office study and the local night law school, the University of Omaha law school. It thus gave the full-time law college its sought-for primacy. In doing this, the supreme court asserted its exclusive authority over questions related to bar admissions.

In this period, the Legal Education Committee of the Nebraska Bar Association continued to lobby for more stringent admissions standards. Earlier, there had been long and acrimonious debates, but now the opposition was quieted. Speech after speech cited statistics that Nebraska was one of the states with the highest percentage of attorneys and that such overcrowded conditions could lead to undesirable and unethical conduct.<sup>152</sup> Implicit in these remarks was the belief that fewer lawyers meant higher profits. Restricting admissions must have seemed like one solution—at least, it caused the opponents of restricted admissions to forfeit the battle.

The Nebraska Bar Association began to direct its requests for change to the supreme court. As with the other major professional issue of the period, bar integration, the Nebraska lawyers were consistently unsuccessful with the state legislature.<sup>153</sup> As has been noted, the Nebraska legislature was responsive to a more populist constituency. The law was seen as a public profession, meaning not only that it was to be regulated in the public interest, but that access to it should be available to as large a part of the public as possible. It was therefore reluctant to increase admission requirements. In the late 1920s, suggestions were made at bar meetings that the court, as a group of lawyers, would be more sympathetic to what was becoming an in-house problem.<sup>154</sup>

However, it was the bar commission which first responded to these new professional concerns. There was no direct expression

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151. These developments were national in scope. It was during this period that full-time law schools gained primacy throughout the nation.

152. 22 NEB. STATE BAR ASS'N PROCEEDINGS 21-23 (1931); 23 NEB. STATE BAR ASS'N PROCEEDINGS 20-25 (1932).

153. J. Quinlan, *An Historical View of the Integration of the Nebraska State Bar Association*, Apr. 6, 1976 (unpublished paper in the files of the author).

154. *Id.*; 25 NEB. STATE BAR ASS'N PROCEEDINGS 13-14 (1933).

of the bar's position, but the statistics tell a story. Eighty per cent of the applicants passed the bar exam in the mid-1920s, and those who failed in their first efforts were probably more successful soon after. By the mid-1930s, roughly 50 per cent of the applicants were admitted.<sup>155</sup> The most probable explanation is that the commission reacted to its brethren's concern with young competition. The result, of course, was to make study at a merely reputable law school (e.g., the Omaha College of Law) or in a law office less attractive.

The supreme court was the next institution to respond. In 1933, it adopted rules which made it considerably more difficult to study law in a law office.<sup>156</sup> Whether this was necessary is doubtful, for the number of law office students was declining of natural causes. It had been apparent for some time that this manner of study was not suited for the mid-20th century. Law was simply too complex and too national to allow students to learn in an unsystematic way with such a local and rural emphasis. For example, most law office students received little help from their preceptors. In an attempt to give some coherence to their work, they frequently turned to various correspondence courses. Nevertheless, in 1933, the court required pre-legal education equivalent to high school and in 1937 raised the pre-legal requirement to two years of college.<sup>157</sup> In 1933, law office students were required to register at the beginning of their terms of study and it was recommended that the bar commission examine these students annually. In 1937, the court ordered the commission to make such annual tests. Finally, the court gave the commission power to terminate any student's registration if the preceptor did not meet certain minimum qualifications.

Some of these rules were of greater symbolic than practical importance. As has been noted, law office study was declining, and the supreme court legitimated, rather than caused, its demise. For example, some people complained that a few lawyers acted as preceptors to many students, hinting that the preceptors were taking advantage of the students. Thus, the rule developed that the bar commission could terminate a student's registration if the preceptor had more than three students annually. However, the apparent fact was that only a handful of lawyers were preceptors to more than five students over a five year period, and these students had roughly the same pass/fail rate as other law office students.<sup>158</sup>

In 1936 and 1937 the court moved against the non-elite schools.

155. See [1933-37] NEB. BAR COMM'N REFS. TO SUP. CT., *supra* note 61.

156. Nebraska Supreme Court Journal YY, at 379-80 (1933).

157. Nebraska Supreme Court Journal CCC, at 236 (1937).

158. See II NEB. LAW STUDENT REGISTER, *supra* note 147.

First, there was a gesture to equality. The diploma privilege was cancelled.<sup>159</sup> This made the bar examination the principal academic screening device for all. However, there was no opposition to this change within the elite law school community. As has been indicated, neither Creighton nor the University of Nebraska believed that it was practically important.<sup>160</sup> Second, the pre-legal education requirement was increased to two college years. Finally, in 1937, the court ruled that to be eligible to take the bar examination a student must have graduated from a reputable school, which meant that it had to be on the ABA's approved list, or until July 1, 1940, that it had to be approved by the Nebraska Supreme Court.<sup>161</sup> This meant that in Nebraska, Creighton and the University of Nebraska would remain reputable, since both were on the ABA approved list. The University of Omaha Law College would not.

The most immediate result of the court's rule was a decline in the University of Omaha's attendance.<sup>162</sup> Fewer students were interested in attending a law school which might not even qualify them to take the bar exam. Many students chose to go to the day schools because even the University of Omaha had to require two years of pre-legal college education. This, of course, meant a decline in the school's revenue. Although it was not a profit-oriented school, the decline in revenue in fact dictated its end. Whatever improvements, such as a full-time staff or a larger library or better administrative help, were needed, all became increasingly difficult to purchase. Nevertheless, the school petitioned the court for yearly approval,<sup>163</sup> sought a change in the rule,<sup>164</sup> negotiated

159. Nebraska Supreme Court Journal BBB, at 317-19 (1936).

160. In its infancy, the diploma privilege was only an indication of legitimacy; it was not needed once this purpose had been served.

161. Nebraska Supreme Court Journal CCC, at 154 (1937).

162. ABA SECTION OF LEG. EDUC. AND ADMISSIONS TO THE BAR, REPORT ON THE UNIVERSITY OF OMAHA LAW SCHOOL (1939) (on file with Clerk of Nebraska Supreme Court) [hereinafter cited as 1939 REPORT ON THE UNIVERSITY OF OMAHA LAW SCHOOL], demonstrates the decline with the following figures:

Year	CLASS					Total
	1st yr. Class	2nd yr. Class	3rd yr. Class	4th yr. Class	Irreg. & Spec. Students	
1935-1936	72	50	32	26	47	227
1936-1937	76	48	34	30	44	232
1937-1938	22	37	49	29	15	152
1938-1939	11	5	35	31	18	100
1939-1940	6	10	4	34		54

163. See Application, *In re* University of Omaha Law School Approval, filed with the Clerk of the Nebraska Supreme Court, Oct. 16, 1937.

164. Motion for Permanent Accreditation, filed with the Clerk of the Nebraska Supreme Court, Dec. 23, 1939.

with the ABA accreditation group,<sup>165</sup> and finally appealed to the state legislature for assistance.

In its dealings with the court and the ABA, the school was unsuccessful. The supreme court did grant yearly accreditation, in part because of a concern for the existing students who had relied on the old rule, but it refused to budge from its 1940 deadline.<sup>166</sup> The school had equal difficulty with the ABA investigative committee. In 1938, it concluded that the University of Omaha Law College did not meet its standards. The school lacked "three full-time men, . . . [and] 7,500 usable volumes in the library." It had failed to "enforce admissions requirements [and there was] the absence of any real standards of scholarship."<sup>167</sup> In 1939, the committee concluded that improvement efforts had been inadequate, and the school did not maintain "a sound educational policy."<sup>168</sup>

Thus an impasse had been reached within the professional community. Those at the University of Omaha law school saw the issue in political terms. They believed that one segment of the legal education community, the day schools, had struck a blow through the supreme court against their own poor-boy, night school segment. For example, in one brief to the supreme court supporting arguments for a change in the 1937 accreditation rule, representatives of the University of Omaha law school stated that the ABA's Section on Legal Education was a "prejudiced, biased tribunal whose settled policy is directed against the existence of night law schools."<sup>169</sup>

The University of Omaha Law College had to turn outside the law community, and in 1941, it secured the passage of L.B. 114.<sup>170</sup>

165. Authorities cited notes 73, 162 *supra*.

166. Nebraska Supreme Court Journal DDD, at 202 (1938).

167. 1938 REPORT ON THE UNIVERSITY OF OMAHA LAW SCHOOL, *supra* note 73.

168. 1939 REPORT ON THE UNIVERSITY OF OMAHA LAW SCHOOL, *supra* note 162. In 1938, the ABA added this qualitative standard to its accreditation criteria. 63 A.B.A. REP. 161-62 (1938).

169. The active membership of the standardization agency of the A.B.A., which is the Section upon Legal Education and Admissions to the Bar, is composed predominantly of Day Law School instructors and deans. The Advisor who is appointed by this Section carries out its policies. This Section is a prejudiced, biased tribunal whose settled policy is directed against the existence of night law schools.

Brief for the Law School at 6, *In re Accreditation of the University of Omaha Law School*, filed December 20, 1939 (on file with Clerk of Nebraska Supreme Court).

170. Law of May 12, 1941, ch. 7, [1941] Neb. Laws 75-76.

This legislation clearly was directed at preserving the University of Omaha Law College and its students. The legislature's method was to define reputable for itself. It meant "all resident law schools now organized, operating and existing within this state" and it declared that "graduates of any such law school are hereby declared to be eligible to take and may take the bar examination." Nevertheless, in 1941, when a University of Omaha Law College graduate, James J. Ralston, sought to take the bar exam, the court clerk refused to permit him. He therefore brought an action of mandamus to secure the right to take the exam.

The supreme court concluded that it, and not the legislature, had the ultimate authority to prescribe rules for bar admission.<sup>171</sup> However, its logic and authority were weak. For example, when its Nebraska authorities are examined, the court's conclusion is seen to rest on the significance of two Nebraska cases decided in the 1893-1910 period discussed. If viewed in historical perspective, these cases only hold that a particular piece of 1895 legislation gave the supreme court, rather than the district courts, the power over bar admissions. The court did not then address the issue of its power vis-a-vis the state legislature.

The court first questioned whether the legislative or judicial department had the authority to prescribe rules for admission to the bar. It answered that the judiciary had the authority, quoting from prior Nebraska opinions.<sup>172</sup> The language quoted was accurate, but the quotes were taken out of context. The chain of

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171. *State ex rel. Ralston v. Turner*, 141 Neb. 556, 4 N.W.2d 302 (1942).

172. This court in *In re Disbarment Proceedings of Newby*, 76 Neb. 482, 107 N.W. 850, held: "This court alone can pass upon the qualifications of applicants for admissions to the bar."

In *State v. Barlow*, 131 Neb. 294, 268 N.W. 95, this court held: "The supreme court is vested with the sole power to admit persons to the practice of law in this state and to fix the qualifications for admission to the bar." In the body of the opinion it was said (p. 299): "This court has heretofore recognized and decided that it has the power to adopt rules fixing the qualifications for admission to the bar, and requires a higher standard of educational qualification, than does the statute," citing *In re Disbarment Proceedings of Newby*, *supra*. In the latter case it was said (p. 490): "It is a principle of general, if not uniform, application that the court which is entrusted with the power and the duty of determining the qualifications for admission to the bar has, by implication, the power and duty also to determine when those qualifications are wanting, and when the privilege of that high calling has been forfeited."

In *State v. Childs*, 139 Neb. 91, 295 N.W. 381, it was said in the opinion: "This court \* \* \* is likewise invested with exclusive power to admit persons to the practice of law in this state and, except for the possible right of the legislature to make minimum requirements for the protection of the pub-

Nebraska cases<sup>173</sup> leads back to *In re Disbarment Proceedings of Newby*<sup>174</sup> and *In re Admission to the Bar*.<sup>175</sup> Both cases were products of a period in which the legislature in 1895 had explicitly

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lic by a proper exercise of the police power, to fix the qualifications for admission to the bar."

The foregoing cases use the definite and explicit language that this court has recognized the legislative functions of making minimum requirements for admission to the bar and likewise specifically states the power of the court with respect to qualifications for admission to the bar.

*Id.* at 561-62, 4 N.W.2d at 306.

173. In the course of its opinion, the *Ralston* court cited *In re Admission to the Bar*, 61 Neb. 58, 84 N.W. 611 (1900), and *In re Disbarment Proceedings of Newby*, 76 Neb. 482, 107 N.W. 850 (1906). It also cited the following "relevant" Nebraska cases of *State ex rel. Wright v. Barlow*, 131 Neb. 294, 268 N.W. 95 (1936), and *State ex rel. Johnson v. Childe*, 139 Neb. 91, 295 N.W. 381 (1941), both original supreme court actions for contempt for practicing law without a license.

The *Barlow* court relied on the Nebraska cases of *In re Admission to the Bar*, *In re Disbarment Proceedings of Newby*, and *State ex rel. Sorensen v. Goldman*, 127 Neb. 340, 255 N.W. 32 (1934), an original supreme court action to disbar defendant. On the point at issue, the *Goldman* court stated:

Since the passage of the act of 1895 (ch. 6) the power to license to practice in the courts of Nebraska has been taken from the district courts and lodged exclusively in the supreme court. *In re Admission to the Bar*, 61 Neb. 58.

This court alone can pass upon the qualifications of applicants for admission to the bar, and has sole power to annul such admission. *In re Disbarment Proceedings of Newby*, 76 Neb. 482. See *State v. Fisher*, 103 Neb. 736.

*State ex rel. Sorensen v. Goldman*, 127 Neb. 340, 345, 255 N.W. 32, 35 (1934).

*State v. Fisher*, 103 Neb. 736, 174 N.W. 320 (1920), another original disbarment action, cited no new Nebraska authority on this point.

The *Childe* court relied on the following Nebraska cases: *In re Integration of the Nebraska State Bar Ass'n*, 133 Neb. 283, 275 N.W. 265 (1937), which the *Ralston* court had also cited for the analogous point that the supreme court had broad, inherent power to make rules with respect to Nebraska lawyers and, in particular, the power to compel them to be members of the Nebraska State Bar Association; *State ex rel. Wright v. Barlow*, 131 Neb. 294, 268 N.W. 95 (1936); *State ex rel. Hunter v. Kirk*, 133 Neb. 625, 276 N.W. 380 (1937) (original supreme court action for contempt); *In re Disbarment Proceedings of Newby*, 76 Neb. 482, 107 N.W. 850 (1906); *State ex rel. Sorensen v. Goldman*, 127 Neb. 340, 255 N.W. 32; and *State ex rel. Wright v. Hinckle*, 137 Neb. 735, 291 N.W. 68 (1940) (original action for contempt). On the point in issue, the court, in *In re Integration*, *Kirk*, and *Hinckle*, cited nothing new.

Thus, the ultimate Nebraska authority for *Ralston* rests on two cases: *In re Admission to the Bar* and *In re Disbarment Proceedings of Newby*.

174. 76 Neb. 482, 107 N.W. 850 (1906).

175. 61 Neb. 58, 84 N.W. 611 (1900).

vested the power of admission in the supreme court rather than the district courts. In *In re Admission*, the supreme court merely held that the 1895 legislature had meant what it said.<sup>176</sup> In *In re Disbarment*, the court merely held that a necessary implication of the 1895 statute was that the supreme court, rather than the district courts, had the exclusive power to disbar as well as to admit.<sup>177</sup> The holdings do not address the issue of the supreme court's authority vis-a-vis the legislature. The supreme court's 1942 declaration that L.B. 114 was unconstitutional was an assertion without Nebraska authority.<sup>178</sup>

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176. 1. In 1805 the legislature passed an act (ch. 6) to regulate the admission of attorneys at law. Prior thereto they had been licensed to practice in the several courts of this state upon such investigation into the character and qualifications of the applicants as each court deemed proper to prescribe. The act above referred to did not in express terms repeal sections 3 and 9 of chapter 7 of the Compiled Statutes, entitled "Attorneys," and it appears that some of the district courts are still assuming the power to admit to practice generally persons who present certificates of admission from the courts of other states and of territories; and that thereafter such persons apply to this court for admission on a motion made as a matter of course. Such action upon the part of a district court is wholly without authority of law, and such admissions, together with any action taken in reliance thereon, are wholly void. The plain intention of the legislative power, and the necessary effect of the act above referred to, was to vest the power to admit persons to practice as attorneys and counselors of the courts of this state, solely in the supreme court.

*Id.* at 59, 84 N.W. at 612.

177. The judgment of the court should have been limited to disbarring the defendant from practicing as an attorney in that court until further order. Our statute contains no provision for disbarment proceedings. This matter is left to the common law power and duty of the various courts. It is a principle of general, if not uniform, application that the court which is entrusted with the power and the duty of determining the qualifications for admission to the bar has by implication, the power and duty also to determine when those qualifications are wanting, and when the privilege of that high calling has been forfeited. This court has the sole power of admission to the bar, and therefore has sole power to annul such admission when sufficient cause appears. Charges of misconduct and deceit in the district court are properly entertained and dealt with in that court. Charges of criminal or immoral conduct calling for disbarment should be addressed to this court. No doubt the formal certificate to this court of these proceedings and the conviction of the defendant upon these charges are sufficient to require this court to take action. Further proceedings in this court upon the main charge against the defendant are continued until the final determination of the criminal proceedings now pending in the district court of Saline county. When those proceedings are finally disposed of, it will be the duty of the attorney general to so inform this court, and further proceedings will then be taken thereon.

76 Neb. at 488, 107 N.W. at 852.

178. The court also relied on a number of cases from other jurisdictions.

By the beginning of World War II, the court had asserted its ultimate authority in favor of full-time law schools. Law office study was rapidly declining. The University of Omaha Law College virtually had gone out of business. All students had to complete two years of pre-legal college work, and Creighton and the University of Nebraska had raised their pre-legal requirements to three college years in 1937<sup>179</sup> and 1938<sup>180</sup> respectively. All law school students had to have graduated from an ABA approved law school, and all except those admitted pursuant to the unchanged reciprocity rules had to take the bar examination.

## VII. 1941-1950. A CODA

The period from 1941-1950 was one of short-run confusion and adjustment. It was not an era of change, although important finishing touches were put on the settlement of the prior period. It best can be described as a coda to the 1933-1941 time span.

The war, of course, caused confusion. The supreme court relieved certain bar applicants from taking an examination.<sup>181</sup> Additionally, the University of Nebraska College of Law ceased operations for several years during the war. Moreover, immediately after the war, both Creighton and the University of Nebraska relaxed their standards. However, by 1948, Creighton again mandated three years of pre-legal college work and three years of law study,<sup>182</sup> and the University of Nebraska required either three years of pre-legal college work and three years of law study or two years of pre-legal college work and four years of law study.<sup>183</sup> This last 2-4 program was part of Dean Beutel's revolutionary post-war curriculum reform, but by the early 1950s few students were actually enrolled in it.<sup>184</sup>

In 1943, the legislature reenacted the pre-1941 law as part of the general recodification.<sup>185</sup> This reenactment arguably supports a democratic, egalitarian interpretation of the legislation for the pre-legal college work requirement was eliminated. It is more probable, however, that the legislature simply believed that the

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179. Creighton University Bulletin, College of Law, 1937-1938.

180. University of Nebraska Bulletin, College of Law, 1938-1939.

181. Nebraska Supreme Court Journal GGG, at 540 (1942).

182. Creighton University Bulletin, College of Law, 1948-1949.

183. University of Nebraska Bulletin, College of Law, 1946-1947. In the academic year 1961-1962, this program was abandoned.

184. C. Circo, 1903 and 1946: The Making and Remaking of the University of Nebraska College of Law, Apr. 16, 1976 (unpublished paper in the files of the author).

185. Act of May 15, 1943, ch. 115, § 21, [1943] Neb. Laws 408, 409.



supreme court had held all of L.B. 114 unconstitutional.<sup>186</sup> Thus, the current statute, although an act of impotency, requires pre-legal work equivalent to three years of high school and grants the diploma privilege to University of Nebraska graduates. The court, on the other hand, consciously changed its rules once more in 1949 to eliminate the almost extinct practice of law office study. In that year, the rules were changed so that only graduates of ABA listed schools could take the bar examination.<sup>187</sup> In 1950, the ABA raised its pre-legal requirements to three years of college, or, in the case of a four year law school, to two years of college.<sup>188</sup> Thus the court and the ABA caught up with the Nebraska law schools' practices.

### VIII. CONCLUSION

The present institutional pattern has been set since 1950. To be admitted to practice in all Nebraska courts one must (1) graduate from an ABA accredited school, which means that one has to have three years of pre-law college and three years of full time or four years of part-time law school study, and (2) pass a bar examination administered by a bar commission and exclusively regulated by the supreme court. In Nebraska, there are only two law schools, both full-time day schools. They supply most of Nebraska's attorneys. A lawyer who has been admitted to practice in another jurisdiction can be admitted in Nebraska without examination if the other jurisdiction's admission rules were equal to Nebraska's or if the attorney had practiced for five of the last ten years. The supreme court has asserted its exclusive control in this area, and it has been virtually unchallenged. The selective law schools and the supreme court have prevailed.

This paper does not speculate as to whether there will be, or even ought to be, another wave of change. Clearly there have been subsurface changes. For example, both the University of Nebraska and Creighton usually require a college degree for admission

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186. There is justification for this conclusion. In *Ralston*, the Nebraska Supreme Court wrote:

L.B. 114 is unconstitutional in that it directly usurps the inherent power of this court to fix and determine the qualifications of an applicant for admission to the bar in this state on a subject which naturally falls within the orbit of the judicial branch of government. Even if the subject of the legislation was a proper exercise of legislative power, L.B. 114 is void and unconstitutional in that it freezes the cases. This court has repeatedly held such legislation to be unconstitutional.

141 Neb. at 573, 4 N.W.2d at 312.

187. Nebraska Supreme Court Journal LLL, at 163-64 (1949).

188. 75 A.B.A. REP. 411, 412 (1950).

rather than the stated three college years. School applicants are required to take the Law School Aptitude Test. There has been recent experimentation with a multi-state bar exam. Specialization and continuing legal education are discussed openly. To date, these movements and interests, as well as others, have made no impact on the formal structure and the institutional divisions of power. Whether they will, or ought to, is left an open question.